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Supreme Court of the United States

October Term, 1941

No. 540

314-66.
314US # 4
NIC-OMA

In the Matter

of

SARAH M. NICHOLS, BANKRUPT

PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1941

No.

In the Matter

of

SARAH M. NICHOLS, BANKRUPT

Petition for Writ of Certiorari

John Remington Nichols, Russell Mabbatt Nichols, and Walter Rogers Nichols, by their counsel, pray that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit, to review the decree of that Court entered in the above entitled cause on June 9, 1941, affirming an order of the United States District Court dismissing a petition to review an order of the Referee in Bankruptcy.

Opinions Below.

The opinion of the District Court is not reported but appears on pages 38 to 44 of the Record. The opinion of the Circuit Court of Appeals is reported in 120 Fed. (2d) ——and appears on Page 84 of the Record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A., Sec. 347). The decree of which a review is sought was entered on June 26, 1941. This petition is presented as of August 19, 1941.

STATEMENT.

In order to give more detailed references to the Record and to conform to references used in the court below, the relevant portions will be hereinafter designated by the side-page or folio numbers rather than by the numbers at the tops of the pages. For example, a reference to (fol. 65) will mean that portion of the Record on page 22 which lies between the numbers 65 and 66 in the left-hand margin.

In 1899, one Eli F. Rogers died in Branford, Connecticut, leaving a will by which he gave the life use of his property to his wife and then provided as follows:

> "*Fifth.* I give, devise and bequeath to my niece Emily N. Mabbatt, or her issue, and to my nephew Edward H. Rogers, or his issue, all the rest, residue and remainder of my estate both real and personal, to be divided equally between them (per stirpes) share and share alike (and in the event that either my niece Emily N. Mabbatt, or my nephew Edward H. Rogers should die before my wife Sophia M. Rogers, leaving no issue surviving at that time it is my will that all the residue go to the survivor,) to them and their heirs forever." (Rec., fol. 212.)

His niece predeceased him, leaving five children, of whom one was Sarah M. Nichols. Mrs. Nichols went into voluntary bankruptcy in 1912 in New York, dying a few months later a resident of Branford, Connecticut, and without having applied for a discharge (fol. 63). Debts totalling $6,039.10 were scheduled (fol. 166), but it does not appear how many were proved. Apart from the claims of V. T. Hammer, totalling $3,460, the largest of them was $746.05. No Trustee was elected and the case was closed on December 8, 1913, as a no-asset case (fol. 63). No interest under any will was scheduled (fol. 168). It does not appear that Mrs. Nichols had actual knowledge of any interest under the Rogers will or under the Norton will hereinafter mentioned.

Mrs. Rogers having died in 1915, the Probate Court ordered a distribution of the remainder, after hearing upon legal notice, under which one-tenth of the estate was distributed in 1917 to the Estate of Sarah M. Nichols (fol. 188). The Probate Court did not publish the reasons for this conclusion of law. At the hearing thereon, no creditor appeared to claim the benefit of the legacy by reason of the prior adjudication. In 1917, an administrator of the Nichols estate was appointed by the Branford Probate Court, six months were limited to creditors to present claims, and the Rogers legacy was turned over (fols. 64, 236, and 188). No claims were presented (fol. 242), but the administrator did nothing further to settle the estate until 1939, when an inventory and account were filed, showing a balance on hand of about $6,000. and asking for an order of distribution (fol. 190). The Probate Court set the hearing thereon for a month ahead and, pursuant to its order, notice was given to all creditors appearing in Mrs. Nichols' bankruptcy schedules as well as to officials of the bankruptcy court and to the Nichols heirs (petitioners herein) (fols. 194-203). Before a decision was rendered, no creditor having appeared in the Probate Court, a creditor having a claim of $746.05 obtained an *ex parte* order from the District Court in New York on January 24, 1940 (fol. 205), reopening the bankrupt estate, and obtained the appointment of an ancillary receiver in the District Court of Connecticut, together with an injunction against transfers of the Nichols property (fols. 65 and 66). As a result of these proceedings, no decision or order was ever entered by the Probate Court.

Since the inception of the present proceedings, the Supreme Court of Errors of Connecticut has handed down its decision finding that a legacy of $10,000. (with interest for about three years) should be paid to the estate of Mrs. Nichols under the will of Henry B. Norton, who died in Norwich, Connecticut, in 1893, which legacy had been awarded by the trial court to other persons and in which appeal the present petitioners were appellants. *Congregational Home Missionary Society* vs. *Thames Bank & Trust Co.*, 127 Conn. 1 (1940). This legacy will obviously be subject

to the same disposition as may be made of the funds in dispute here.

Upon petition for a summary turnover order, made by the Trustee in bankruptcy and brought against the Nichols administrator and the present petitioners, the Referee granted the petition and the District Court dismissed a petition for review, which action was affirmed by the Circuit Court of Appeals.

The Question Presented.

The question presented is as to whether the funds in the hands of the administrator should be distributed to the heirs at law of Mrs. Nichols according to the Connecticut statute of distributions or should be turned over to the Trustee in bankruptcy for administration in New York.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In not applying the two-year limitation upon suits by the Trustee contained in Section 11 (d) of the Bankruptcy Act of 1898.

2. In not holding the creditors of Mrs. Nichols barred of the funds by their laches.

3. In not holding the creditors barred by the statutes of limitation.

4. In not holding the creditors barred by failure to present their claims to the administrator within the time limited by the Probate Court.

5. In not holding the Trustee barred of the funds by the barring of all the creditors.

6. In allowing the creditors and Trustee more than a reasonable time to recover unscheduled assets after they knew or ought to have known of their existence.

7. In not holding the Rogers and Norton legacies to be burdensome assets, recoverable only by legal action, and therefore subject to the Trustee's election to assume or not to assume title to them.

8. In holding that the legacies were required to be scheduled.

9. In holding that title to the funds passed to the Trustee in 1940.

10. In staying the Probate Court proceedings (in effect) after the lapse of more than two years, contrary to the Bankruptcy Act of 1898.

11. In denying (in effect) the jurisdiction of the Probate Court to determine conclusively the distributees of the Rogers estate.

12. In not holding the petitioners herein to be the legatees under the Rogers will.

13. In not ordering the Probate Court relieved of all restraints upon its jurisdiction to distribute the Nichols estate by dismissing the Trustee's petition for a summary turnover order.

Reasons for Granting the Writ.

I.

The Decision of the Circuit Court of Appeals is in Conflict Upon Essential Points with Decisions of the Circuit Court of Appeals for the Sixth Circuit.

(a)

The Court below has tacitly approved the decision of the trial court recognizing the rule that a trustee in bankruptcy must proceed to recover unscheduled assets within a reasonable time after receiving knowledge of their existence but measuring this time from the date of actual notice rather than from the date of constructive notice. In this, the decision is directly contrary to that in *Mills Novelty Co.* vs. *Monarch Tool & Mfg. Co.*, 49 Fed. (2d) 28 (C.C.A. 6, 1931).

In that case, a trustee was charged with notice of the issue of a patent, actual notice not being proved, and, having made no attempt to recover the asset for seventeen years, was held barred of his right thereto. Here, the Trustee has sought to recover an asset of which he had constructive knowledge at least since 1916 through distribution of the Rogers estate,—*Packer* vs. *Meeks*, 96 Conn. 319, 324 (1921)—but nothing was done indicating an intention to claim it until 24 years later and then only after petitioners, as heirs of Mrs. Nichols, had shouldered the burden of bringing the settlement of the estate to completion and of a three-year litigation to recover the Norton legacy. The two decisions cannot stand together. It is highly important that the conflict be resolved, for the rule of law, if allowed to stand, must be applied to other facts than these. It is fortuitous that no real estate was involved in the instant case; if it had been, the effect of the decision below would be disastrous if used as a precedent, for real estate titles could not be determined with reasonable certainty for fear of unasserted claims in bankruptcy being asserted long years afterward, with no means of knowledge of the bankruptcy proceedings if they happened to be in another jurisdiction than the real estate.

Even if the date of actual notice is controlling, the Mills case and this one are still in essential conflict. The creditors,—who cannot enlarge their rights by the simple expedient of subsequently having a trustee appointed,—knew of the Nichols assets on November 18, 1939, when they received actual notice of a hearing on the distribution thereof to be held on December 18, 1939. They waited until more than a month after the hearing before performing the simple act of obtaining an *ex parte* order to reopen the bankrupt estate and before notifying anyone concerned that they claimed the property. Reasonableness must be measured according to circumstances, and it is submitted that this delay was unreasonable as a matter of law. It is only by chance that the assets were not distributed and dissipated before the creditors acted at all. Even then, action was taken by a single creditor, having a comparatively small claim which it undoubtedly had long since charged off its books.

Constructive notice is merely notice which the law imputes to one who would have had actual notice if he had used reasonable diligence to protect his rights. Here, in addition to the constructive notice from the probate records, the creditors would have known the essential facts in 1913 or 1914 if they had made any reasonable attempt to collect their claims when they found that no discharge in bankruptcy had been sought. The case for constructive notice here is far stronger than in the Mills case.

(b)

It was unnecessary for the Court below to decide the exact technical question as to whether Mrs. Nichols' interests under the Rogers and Norton wills were in fact vested or contingent remainders within the legal meaning of the words. A remainder may be technically vested, and yet be so uncertain as to be incapable of being levied upon by creditors,—*Smith* vs. *Gilbert*, 71 Conn. 149 (1898),—or assigned by the remainderman,—*Smith* vs. *Pendell*, 19 Conn. 107 (1848); *Bartholomew* vs. *Muzzy*, 61 Conn. 387 (1891). Interests so contingent that three years of litigation are needed (as under the Norton will) to settle their nature are of this class even though they be ultimately found vested. Such interests need not be scheduled in bankruptcy and do not pass to a trustee. *In re Martin*, 47 Fed. (2d) 498 (C.C.A. 6, 1931). Cp. *In re Meiberg*, 1 Fed. Supp. 892 (D.C., Iowa, 1932).

The Court below decided in direct opposition to the Martin case. The conflict is important, for bankrupts ought not lightly to be charged with duties with respect to doubtful estates of which they may have no actual knowledge or creditors lightly to be relieved of all obligation to investigate the collectibility of their claims after a discharge can no longer be asked. There is no question here of the alternative being to condone a willful concealment of assets, for the record is barren of indication that Mrs. Nichols knew of the terms of the wills of two comparatively distant relatives who had died over twelve years before her bankruptcy. In the Rogers estate, she did not even have legal notice of the hearing

on probate of the will (let alone of the terms of the instrument itself), for the notice ordered (fol. 225) was not given according to its terms (fol. 226).

II.

THE COURT BELOW HAS DECIDED IMPORTANT QUESTIONS OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

(a)

For twenty-seven years after Mrs. Nichols' death, no trustee of her bankrupt estate was appointed, and no discharge had ever been applied for. Any claim to the property distributed to her estate in 1917 must then have been made by the creditors as such. They then represented their own interests. Under the local law, the creditors were free to start suit at any time. *American Woolen Co.* vs. *Maaget,* 86 Conn. 234 (1912). They were thus within the class required by the local law to present their claims to the administrator within the time limited by the Probate Court which expired in 1917. Conn. Gen. Stat., Rev. of 1930, Sec. 4914. Such presentation was a substantive part of their claim, the statute not operating as a statute of limitations which could be tolled. *Grant* vs. *Grant,* 63 Conn. 530, 546 (1893).

The Court below has decided contrary to the law thus laid down. Its decision makes the determination of the necessity of presenting claims against decedents' estates (of which public policy demands a prompt settlement) depend upon whether or not a trustee is appointed decades later. If real estate were involved (as it might well be in some later case to which the ruling here laid down will be applied), an intolerable uncertainty would ensue.

(b)

The rights passing to the Trustee must be adjudged as of the adjudication in 1912. *Bailey* vs. *Baker Ice Machine Co.,* 239 U. S. 268, 275 (1915). Whatever changes in local law may have

occurred since, it seems quite certain that the Connecticut law then considered a gift to a class,—taking effect after an intervening life estate,—as vesting at the testator's death but subject to opening to let in after-born members of the class and to drop those who had died after the testator and before the life tenant.

Bolles vs. *Smith*, 39 Conn. 217 (1872).
Jones' Appeal, 48 Conn. 60 (1880).
Farnam vs. *Farnam*, 53 Conn. 261 (1885).
Belfield vs. *Booth*, 63 Conn. 299, 304 (1893).

The Farnam and Jones cases have been recently approved in *Trowbridge* vs. *Townsend*, 112 Conn. 104, 112 (1930), in which, however, circumstances not here present led to a different result on the facts.

There can be no doubt that an alternative gift to the "issue" of Emily N. Mabbatt (fol. 212) has all the attributes of a gift to a class. The decision below runs counter to these decisions of the Connecticut courts. The distribution made in 1916 does not preclude the application of the correct construction of the Rogers will and the remedying of the injustice done then. *Home Trust Co.* vs. *Beard*, 116 Conn. 396 (1933). If incorrect but conclusive, the question may still be an element in determining the equities in favor of the petitioners. The probate decree of 1916 need not be attacked in order to send the property where the Probate Court must have expected it to go when that decree was entered; it is necessary only to remove the bar to orderly distribution of the Nichols estate by dismissing the Trustee's petition for a summary turnover order.

(c)

Under local law, when the Probate Court has possession of the *res*, its proceedings are *in rem* and its orders are sufficient to bind all parties in interest, whether present or absent. *Rockwell* vs. *Bradshaw*, 67 Conn. 8, 18 (1895).

The Probate Court had unquestioned jurisdiction to order distribution of the Rogers estate and find who were the distributees. All persons having any claim to a portion of his estate were bound to appear and present their arguments at that time, including the creditors of Mrs. Nichols, who were not then (1916) represented by the Trustee. When it was ordered that one-tenth of the estate be distributed to the estate of Mrs. Nichols, any claim that her legacy had vested by operation of law in someone else became barred. By such order, the property was left still within the probate jurisdiction, so that the order to present claims within six months or be barred was binding on all concerned.

The Court below has rejected this local law and has refused to give binding character to the order of the Probate Court.

III.

This Case Presents Important Questions of Federal Law Which Have Not Been But Ought to be Settled by This Court.

Questions involving the construction and applicability of the Bankruptcy Act are clearly federal questions. *Hammond* vs. *Whittredge*, 204 U. S. 538, 547 (1907).

The Bankruptcy Act has no specific provisions covering the effect of failure to apply for a discharge, the effect of failure to elect a trustee for a long period of years, the effect upon the rights of a trustee of the barring of creditors' claims by laches, limitation, or otherwise, or the duties of creditors to pursue their own claims after the closing of an estate as a no-asset no-trustee case. Nor has this Court directly construed the two-year limitation on suits by or against a trustee contained in Section 11(d) of the Bankruptcy Act. Few if any paragraphs on these subjects are included in the standard law digests. These are all important questions, frequently arising in ordinary practice. Rules laid down in this case will govern those cases as well where real estate is involved, so that the security of titles demands authoritive answers to the

problems. It is necessary at present to rely largely upon a few state court decisions covering different phases of the questions.

American Woolen Co. vs. *Maaget,* 86 Conn. 234 (1912).
Durrett vs. *Harris,* 148 Ark. 4 (1921).
Stipe vs. *Jefferson,* 192 Minn. 504, 506 (1934).
Pink vs. *Tenenbaum,* 294 N. Y. S. 101 (App. Div., 1937).
Watson vs. *Motley,* 201 Ala. 25 (1917).
Roberts vs. *Martin,* 158 Ky. 124 (1914).
Rand vs. *Sage,* 94 Minn. 344 (1905).

Decisions in such cases as *Johnson* vs. *Collier,* 222 U. S. 517 (1912), and *Danciger etc. Oil Co.* vs. *Smith,* 276 U. S. 542 (1928), skirt the edge of such problems but are concerned with special fact situations which destroy their usefulness as guides where more general problems are involved.

IV.

THE COURT BELOW HAS DECIDED IMPORTANT FEDERAL QUESTIONS IN PROBABLE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Martin vs. *Commercial National Bank,* 245 U. S. 513, 519 (1918), seems to hold that a trustee is barred if the creditors whom he represents have become barred. The Court below, in refusing to consider the creditors as creditors during the period between 1913 and 1940 has failed to follow the implications of this decision.

Kinder vs. *Scharff,* 231 U. S. 517 (1913), holds that the two-year limitation upon suits by the Trustee (Bankruptcy Act, Section 11(d)) is not removed by a subsequent order reopening a closed estate. The Court below has failed to follow the admonition of that decision (P. 520) that "It is obvious that there must be some limits if the promise of repose after two years in Section 11 d is not to be a mirage." Instead, it has followed a line of decisions construing the Act of 1867, of which the provisions are inapplicable to the present situation.

In *Murphy* vs. *John Hofman Co.*, 211 U. S. 562, 569, (1909), and *Isaacs* vs. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737 (1931), this Court held that when one court has possession of property, through its officers, all other courts lose jurisdiction. Cp. *In re English*, 127 Fed. 940, 943 (C.C.A. 2, 1904); *In re Naslund*, 6 Fed. Supp. 109 (D. C., Wash., 1933). In denying the Probate Court the right to make a conclusive distribution of the Rogers estate, the Court below has decided contrary to these decisions. The same principle would apply to the property after it had passed into the possession of other officers of the same court under a decree (the 1916 distribution) which the Trustee has not attacked, so as to make the funds subject to the claims of only those creditors who presented claims within the time limited by the local law.

In *Sparhawk* vs. *Yerkes*, 142 U. S. 1, 13 (1891), it was held that a trustee must elect within a reasonable time whether to take title to a potentially onerous asset or to abandon it. There is no logic in lengthening the time for such election by the mere failure to elect a trustee for an unreasonable period. In such case, the election must be made by either the creditors or the bankruptcy court itself. The Court below refused to apply this rule on the ground that the assets were not onerous. The creditors themselves thought the assets sufficiently doubtful of recovery to make it inadvisable to participate in the 1939 probate proceedings of which they had adequate advance notice. Probate proceedings are not had on the motion of the Probate Court; somebody must initiate them and supervise them. The creditors here left it to the petitioners to agitate in that court when the administrator took no action for 22 years. The time and expense of the present proceedings can hardly be disregarded in characterizing the onerous quality of the assets. Furthermore, the ruling in this case will manifestly govern the legacy considered in *Congregational Home Missionary Society* vs. *Thames Bank & Trust Co.*, 127 Conn. 1 (1940). The three years of litigation supported in that case by the petitioners here before adverse rulings of the lower court were overturned must necessarily constitute a burden about which a trustee would have

to think twice before assuming it. To call these assets "of unquestioned value, and in no contingency burdensome," when nobody knew in advance whether the Trustee would recover a cent, is too unreal to accept. If that conclusion is rejected, the decision is in conflict with the Sparhawk case.

V.

THERE BEING NO CONTROLLING PRINCIPLE OF LAW, THE DECISION BELOW REACHES A MANIFESTLY UNJUST RESULT.

This is not one of the grounds stated in the rules of this Court for granting certiorari. However, the whole end and purpose of appellate courts is to prevent injustice, so that the influence of such a cause upon the discretion to grant a review ought reasonably to be a strong and persuasive one.

There is no controlling principle of law which dictates one result or the other upon the unusual facts of this case. The Court is in a position here to do abstract justice with greater freedom from binding and imperative precedent than has ordinarily been the case with courts since Solomon so wisely decided between the two mothers. The Court below has chosen to ignore this opportunity and to substitute for it an adherence to technicalities which ought not to fetter the modern administration of justice; for example, the distinctions drawn between having or having not reduced the property to possession, when clearly the petitioners herein have been throughout seeking the aid of proper courts to obtain possession of what equitably belonged to them; and also the attention paid to the fact that the administrator has never claimed the funds adversely to the bankrupt (overlooking the administrator's adverse holding against the Trustee, as evidenced by its call upon creditors to present their claims in 1917), whereas it is manifest that the administrator has no controversial interest in the ownership of the funds but is concerned only with protecting itself by delivering the money to those whom the courts say own it.

The injustice claimed by petitioners here lies in awarding to the non-vigilant the fruits of another's vigilance, labor, and expense. The holder of more than half the scheduled claims, V. T. Hammer (fol. 166), has taken no part in these proceedings, which were instituted by one who had held its claim of only $746.05 for over a quarter-century without any attempt to collect or, apparently, to ascertain the probability of collecting. By exercise of reasonable diligence in the years from 1913 to 1917, this creditor could have obtained payment of at least a substantial dividend, leaving the later inheritance from the Norton estate to pass unburdened to the petitioners. Now, having done nothing, having left to petitioners the burden of litigation and of the ordinary probate proceedings, having stood idly by even when it received actual notice of a hearing in 1939 upon the ownership of the fund, it is in position to obtain payment, not only of the full principal of its account, but also of interest for 27 years at rates which practically no property can earn today, carrying along with it the entirely inactive creditors. In addition, the fees of the bankruptcy court and of the Trustee and his attorney, added to the claims and the accrued interest, will in all probability obliterate any balance payable to the petitioners as heirs of Mrs. Nichols,—a balance which would have been substantial had the creditores been vigilant in 1913. The result also dedicates to the creditors the results of the long litigation in the Norton estate. The creditors are allowed to stand like a vulture ready to reap the rewards of a long and doubtful contest, with no contribtuion whatsoever to the manifest expenditure of time and money which alone could have brought the result achieved. It is true that the Norton legacy is not technically before the court now; but the decision of the Connecticut Supreme Court is matter of judicial notice, and the point heretofore made is impressively emphasized,—that the ruling made here will also control other sets of fact and be used as a precedent where differences in details would make a similar ruling unjust and oppressive. The only suggestion of a weakness in the justice of the claims of petitioners is the assertion that they must claim under a constructive fraud of their mother, Mrs. Nichols, in not

scheduling these two legacies. But there is no evidence in the record that she knew of their existence, the testators had died in 1893 and 1899 in places remote from her residence at the time of the bankruptcy, both legacies were highly contingent from her point of view (whatever their technical character) in both fact and law, for she had no foreknowledge of events in 1915 and 1937 (when the life estates fell in) or of the construction that courts would put upon the two wills. The claims of justice appear overwhelmingly on the side of the vigilant and active and against those who have slept on their rights, rejecting the burden of enforcing them; on the side of those who, if successful, will leave the others in no worse position than they were before, and against those whose success will leave the petitioners, not only deprived of their expected inheritance, but also with the burden of time and expense which they have incurred in making the money available at all to any of the parties hereto.

Wherefore it is submitted that this petition for a writ of certiorari ought to be granted.

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